In the Supreme Court of the United States.

OCTOBER TERM, 1897.

J. B. CESSNA ET AL., APPELLANTS,
v.
THE UNITED STATES ET AL., APPELLEES. } No. 79.

APPEAL FROM THE UNITED STATES COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT.

The claim in this case is founded upon a supposed grant, which was nothing but an executory contract, made without authority, annulled by the Government, and abandoned by the grantees for sixty-eight years.

The documentary evidence relied upon to sustain it is found in a copy of the proceedings of the *Ayuntamiento*

of El Paso, in April, 1823, which was found in the archives at Santa Fe, and is as follows:

DOCUMENTS RELATIVE TO HEATH GRANT.

(Defendant's Exhibit No. 9, R. 157.)

PETITION.

Dr. Don Juan Gid, *citizen of the United States* of North America, in the best legal form allowed by law, appears before Your Honorable Body and states: That, not having received up to date any answer to the communication of December last of last year, which I presented to the former *Ayuntamiento*, the predecessor of Your Honorable Body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (*ampleacion*) of the power which is given to Your Honorable Body by the Law of Colonization which was issued by the National Instituent Assembly (*Junta*) of the Empire on the 3rd of January of the present year: For these reasons I again have recourse through this, repeating my request to Your Honorable Body, adding that *I offer to bring for the settlement of the land of El Bracito*, which I ask may be given to me, *thirty families of Christian Catholics*, and among them *blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations: also to build a warehouse supplied with all kinds of merchandise for wholesale: the necessary machines for the manufacture of cotton and cloth goods, another for the*

manufacture of gunpowder, offering, until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms: with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

In view of what has been said and because, for establishing the said machinery, utilizing the farms, grazing stock and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to Your Honorable Body that the *land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an Hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito,* because the said land being broken *it is necesary to leave out various portions of it.* I also propose to Your Honorable Body that until time permits whatever else may be desirable *this settlement be attached to the parish of this jurisdiction:* likewise that *the pasture and woodlands be common,* with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (*sementeras*), and that *the petitioner be the person to whom is entrusted the distribution of said lands,* he being considered *the legitimate justice of said families.*

Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask Your Honors that, you being pleased, and *in order that the said Law of Colonization be executed in all its parts,* notice of this, my petition, be given

to the individuals of this jurisdiction, in order that all those gentlemen who like may better or equal it with a view to the right of preference, in which act Your Honorable Body, to whom is entrusted the power of Father of this Country (*patria*) will weigh at their true value, *the incalculable benefits that result from my petition* whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

Wherefore, I ask and petition Your Honorable Body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

Paso, April 7th, 1823.

JUAN GID.

PROCEEDINGS OF THE AYUNTAMIENTO.

COUNCIL HALLS OF EL PASO DEL RIO DEL NORTE,
April 3rd, 1823. Third of our Independence.

Session of this day, Don Juan Gid, doctor of medicine, of the Anglo-American nation from the States (*sic*) of the Missouri, appeared requesting to know the result of the petition which he made the former *Ayuntamiento* on the 27th of December of last year, through the Secretary of State to His Imperial Majesty, and he is answered: that no immediate reply has been received but that the government of this province, through the captain Don José Antonio Viscarra, political and military chief, in an official communication of the 2nd of March, sent *the decree of the 3rd of January of this year* commanding it to be published and obeyed; which

decree was issued by the National Instituent Assembly (*junta nacional instituyente*) and sanctioned by His Imperial Majesty, the thirty-two articles of which treat of colonization matters. These were read to the said Don Juan Gid, and being made acquainted with them, he to-day *makes a new petition asking that by virtue of the law and its privileges he may be given an "Hacienda" in the same land that he has already asked for, offering to perform everything he promises in the said petition, for the good of this town and the Mexican nation.*

This corporation *having in mind the said colonization laws and the said proposals,* which it considered beneficial and useful to this town, after consulting the private individuals, resolved to provide the following in the matter of the petition:

1st. That, *saving the superior determination of the government, to which this shall be given, his proposals and petition are admitted,* and when he presents himself, the land he asks for *shall be assigned to him* in these terms: The head (*toma*) of the Bracito shall be the central point of the square of said "*Hacienda;*" that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square.

2nd. That for the reason that this jurisdiction, whose territory extends as far as San Diego only, has its woodlands up the river (*rio arriba*) and in this direction grazes its stock, *Don Juan Gid and his families shall only have the "Hacienda," the property of the lands for farming, manufactories and machines, etc., but not in the natural pastures and woods,* which shall be common to these inhabitants and its jurisdiction, as they shall be to the new settlers.

3rd. That this minute, and the petition of Don Juan be made known to the public in order that if

it should happen that any Mexican citizen of the jurisdiction offers *the same propositions for the benefit of the public*, promising to comply with the respective articles of the said decree, he may be admitted in preference to every foreigner, for which purpose the term of three days is given, which time will also serve for the people to show if it is their desire to have *these neighbors, who offer to them instruction in the trades and industry, by settling in El Bracito*, which is about sixteen or eighteen leagues distant from this jurisdiction, and at a place on the frontier, close to the regular habitations of the Apaches.

4th. That Don Juan Gid having the ownership (*propiedad*) of the lands of the "*Hacienda*," all arrangements shall be made with him by any of the inhabitants of this jurisdiction who may desire to locate at El Bracito for the settlement of that place.

5th. The proposals made by the new settler for the benefit of the town are admitted, hoping that he may execute them, as well as comply with the articles of the colonization decree which have reference to him, this *Ayuntamiento reminds him that the families which he shall bring must be honest and belong to the Roman Catholic Apostolic religion*, the only one of the whole empire, by whose laws all who settle in it must abide.

6th. That for the designation of the boundaries of the "*Hacienda*" and the possession of the same, some of the *Alcaldes*, one alderman, and one public attorney will go, who together with Don Juan Gid will examine the *lands suitable for settlement in the territory of the "Hacienda,"* as well as for agriculture, machines and manufactures, which (land) *must be distinguished from that of summer pastures* (*agostaderos*) *and for stock raising.* And it is to be hoped that the

new settlers, so far as they may be able, will surround themselves with plantations of trees, and that the police order be kept so as to facilitate the spiritual and temporal instructions and administration, this to be in the manner to be provided by the secular and ordinary ecclesiastical authorities, for which purpose this shall be given together with this minute, and an authenticated copy of it shall also be made for the protection and information of the party in interest; this original to remain in the archive together with the petition of Don Juan, as a perpetual testimony. Thus it was resolved by the aldermen, who together with the two *Alcaldes* signed it before me, the secretary of the corporation, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
José Manuel García.
José Maria García.
Juan Gil.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

It is a copy of the original to be found in the book of entries of the minutes of this Illustrious Corporation, which remains in the archive under my charge, to which I certify.

Juan Maria Ponce de Leon, Secretary.
[Rubric.]

(R., 168.)

COUNCIL HALLS OF EL PASO, April 3rd of 1823.

The petition of Don Juan Gid being presented it was admitted by the Illustrious Corporation *under the terms which it agreed upon* in the minutes of this day, which when seen by the said Don Juan, *he accepted*, and therefore, on Sunday the 13th instant, the said petition and the minutes will be made public in the manner customary in this place for the purpose they specify. Don José Ygnacio Rascon and Don José Morales, Constitutional *Alcaldes*, executors of the resolutions of their Honorable Body, thus decreed and signed before me, the secretary of the corporation, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 158.)

At the Town of El Paso del Norte on the 13th day of the month of April, 1823, having assembled in these consistorial halls those of the Illustrious *Ayuntamiento*, and a large number of the residents who were previously summoned in the customary manner, the petition of Juan Gid and the minutes of the resolution were read, of which the people once being cognizant and being asked by the First *Alcalde* as to whether they were pleased with the *new neighbors who contemplated joining this jurisdiction*, they answered with many voices in the affirmative showing pleasure and no opposition. Wherefore, immediately it was determined that, on the 16th day of the present month, in consequence of the resolution the *Señor Alcalde* of second election, the public attorney (*síndico personero*) Don Lorenzo Provencio, and the secretary of the corporation, shall go with the petitioner to the place of El Bracito for

the purpose of making the surveys and to execute (*practicar*) what had been resolved by their Honorable Body, by virtue of the sovereign decree of the 3rd of January relative to the colonization system. And by this action the two *Alcaldes* so determined and signed it before me, the public secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 159.)

COUNCIL HALLS OF EL PASO, April 13th, 1823.

The action taken in order to proceed to the execution of the survey and to the possession of the land of El Bracito, which is to be given to Don Juan Gid, being concluded, let the *expediente* in the condition in which it is found be delivered to the commission composed of Don José Morales, Second Alcalde, the Alderman Don José Maria Belarde, the Public Attorney, Don Lorenzo Provencio, and the Secretary of the Corporation Don Juan Maria Ponce de Leon, in order that when their commission to conclude, according to the foregoing writ, they may return it to this corporation to proceed to the other matters that may follow. And by the present decree the Illustrious *Ayuntamiento* thus resolved, the president thereof signing it before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 160.)

COUNCIL HALLS OF EL PASO, April 15th, 1823.

Don Agapito Albo, Deputy to the Most Excellent Corporation of this Province, who resides in this town, presented himself in the character of attorney for this corporation and said: that on account of his duties, and being commissioned by the district, he represented that this *Ayuntamiento* having resolved *to make a grant to the families whom Don Juan Gid proposes to settle* in El Bracito, it appeared to him that with the farms and machinery offered by the *new settlers* in a few years they might be prejudicial to the old inhabitants in all this jurisdiction, for the reason that when the waters would be turned off above and consumed in those farms they would not reach these other ones in the volume desired. Which suggestion being noticed by the members of this body they proceeded to discuss it, and it was determined by all the votes unanimously that the petitioner Don Juan Gid be called, who being present, said that if the case would happen when there would be scarcity of water in this copious river *he and his families* were of the understanding that they had to govern themselves by the wise and prudent laws of the kingdom and the regulations of the *Ayuntamientos* to whom by these it belongs to see that the waters are well distributed. In view of this, and because the said Don Juan again referred to the subjection to the laws and ordinances of the empire, it was resolved to continue the execution of the decree of the 13th instant, which (decree) was given in consequence of the first order of this Honorable Body: and by this order they thus determined and ordered it executed, the gentlemen composing this Illustrious Corporation signing it

before me the secretary of the corporation, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
José Manuel García.
Juan José Gil.
Lorenzo Provéncio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 159.)

Yesterday the corporation being in session, I offered to that Honorable Body various suggestions that it would be prejudicial to this community and the neighboring ones if the giving of property for *Hacienda* to the petitioner, Don Juan Gid, was carried into effect in the lands known as the El Bracito: stating in detail the causes occasioning the harm, to which I was answered that the matter would be discussed by Your Honorable Body, and that its decision would be made known to me by showing me the proceedings had for that purpose. But that has not been done. From the statement that I enclose it appears that to-day possession is to be given to the said Gid, ignoring the form of what has been newly resolved by Your Honorable Body. Among the many things that I suggested one was that it appeared to me unwise that this matter should be

acted upon at once, and that it should be duly considered for greater certainty. Doubtlessly Your Honorable Body has not borne in mind that whatever property the *Ayuntamientos* give to the citizens of the empire, it is necessary under the law to publish thirty proclamations on as many days, to await the claim that may allege a better right: why not so in this case which I find to be of greater necessity. This omission, in my opinion, makes me apprehend that Your Honorable Body hurries with gigantic strides perhaps *to have that annulled which you are going to transact*, and for which you will be responsible to the claims of public law, as it is enunciated in the said statement, which for the reason that it is made a part of the proceedings, to make a demand holding me and Your Honorable Body responsible, it is indispensable for me to take this step to relieve myself of it; and in that case Your Honorable Body will be responsible and not I, attaching this and that which I enclose to the proceedings transacted.

God preserve Your Honorable Body many years.

Paso, April 16th, 1823.

AGAPITO ALBO.

Señor President and Members of this Illustrious Ayuntamiento.

(R., 163.)

(*Justice's Order.*)

COUNCIL HALLS OF EL PASO, April 17th, 1823.

As prayed by the party let it be answered and added to the *expediente*. RASCON.

(R., 163.)

(*Petition presented to Don Agustin* [*Agapito*] *Albo by two citizens.*)

Señor Provincial Deputy, Don Agapito Albo:

Don Francisco Montes, alternate deputy, and Don Antonio Orcasitas, both residents and citizens of this town, state to Your Excellency in the best form, that it having come to our notice that to-morrow the 16th of the present month, members of the corporation of the *Ayuntamiento* of this said town go to give possession to Don Juan Gid, Anglo-American, of the territory of El Bracito on which is to be designated to him the ground for an "*Hacienda*," which must consist as he states in the same, of five leagues square, and to give him the absolute ownership (*propiedad*) thereof on the conditions (*proposiciones*) that he states in the same to the said Illustrious *Ayuntamiento*, and it appearing to us that it must be burdensome to the inhabitants of this town and the neighboring ones, for the reasons which, if it be necessary, we will go and demonstrate, we bring it to the notice of Your Excellency in order that you may be pleased to make it known to the said *Ayuntamiento*, stating at the time what you may deem proper in the matter. And if Your Excellency considers it worth while, make it appear to the said corporation to be pleased to lend attention to the suggestions that occur to us. It being an indispensable circumstance, in our opinion, in order to avert a damage of so great proportions, and in case of its not acceding to this our humble supplication, it is necessary for us to hold Your Excellency or the Illustrious *Ayuntamiento* which proceeds in the matter responsible according as there is motive therefor under the laws; being pleased to receive this our solicitation upon common paper, as none of any seal

can be found. We swear not to be in bad faith, and in the necessary and so-forth.

Paso, April 15th, 1823.

FRANCISCO MONTES.
SANTOS ORCASITAS.

(R., 164.)

(*Justice's Order.*)

This suggestion is of no value because it is contradicted by the writing of Don Santos Orcasitas, presented to the first *Alcalde* on the 19th of April, which is attached to the *expediente*, and only Don Francisco Montes remains pending (*pendiente*).

JOSÉ YGNACIO RASCON.

(R., 165.)

(*Communication in reply to Don Agapito Albo.*)

COUNCIL HALLS OF EL PASO OF THE RIO DEL NORTE, April 17th, 1823. Third.

On this day a paper was opened which the *señor* deputy of this province, residing in this town by permission, Don Agapito Albo, sent yesterday the 16th of the same to this Illustrious *Ayuntamiento*, in which were found a communication containing a statement made to said gentleman by the private citizens, Don Francisco Montes and Don Santos Orcasitas, both documents having reference to the gift and grant which in conformity with law this *Ayuntamiento* has made to Dr. Juan Gid in the lands of El Bracito; and the matter having been discussed with the care the circumstances require, it was resolved to answer the said Don Agapito Albo with regard to his com-

munication of the 16th instant as follows: This *Ayuntamiento* considered that it was its duty to comply, at the instance of a party, with the decree of the 3rd of January of this year, issued by the Instituent Assembly, sanctioned by His Imperial Majesty and ordered published and complied with, by the Governor of this province. For this reason and because also *it judged that it was beneficial to these poor people who stand in such great need of learning trades for their improvement, to put in execution the petition of Dr. Juan Gid*, the term of three days having expired, it is resolved to-day to answer the provincial deputy Don Agapito Albo, residing by permission in this town, in the matter of the communication which he addressed to this corporation in accordance with the suggestion made to him by the individuals he names: stating that it is not in the power of this corporation to undo what it thinks it has done in conformity with law and to the benefit of the people who are immediately under its charge. Thus this Honorable Body resolved, and I communicate it to Your Excellency in reply to the communication of the 16th instant which Your Excellency was pleased to forward to this body, which was received yesterday the 16th of the same. God preserve Your Excellency many years.

Paso, April 17th, 1823. In the Council Halls,

José Ygnacio Rascon.

Eutimio Valverde,
Secretary *ad interim* of the Corporation.

And in due witness the session of this day agreed unanimously, the said documents remaining in this archive, and, with the exception of the eighth alderman, Don Juan Gil, because he said that he did not want to be responsible, the president and the other

members who compose this corporation signed it before me the secretary *ad interim*, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Jn. Maria Belarde.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
Lorenzo Provencio.
José Albares.

Jn. Maria Ponce de Leon,
Secretary.

Señor Alcalde of First Election:

Don Santos Orcasitas, resident of this jurisdiction of El Paso, before Your High Honor, in the best form permitted in law, appears and says: That, being a weak man by human nature itself, he must be more prone to error than to accuracy, and having had an attack of lethargy, not very long, and at the moment that he is beginning to recover or to return to himself, he sees that the light which guides and admonishes him to enquire of the first authority to make known to him what harm can result to him from being one in opinion with the authority; none: and thus awakening, as they say, the private opinion is abandoned and detested, and that of the authority is assented to in all its parts: having the kindness to receive this, my solicitation, upon this common paper as there is none of any seal. I swear not to be in bad faith, and what is necessary, etc.

Santos Orcasitas.

Paso, April 19th, 1823.

Received. Let it be attached to the *expediente*.

Rascon.

(R., 165 and 166.)

PLACE OF EL BRACITO, April 17th, 1823.

Having accepted the commission, it appears from the proceedings, was made of four individuals by the Illustrious *Ayuntamiento* in order to carry into effect the proceedings had in this *expediente*, we came to this place, where, in accordance with what is commanded, designating as the central point of the "*Hacienda*" of which Don Juan Gid is going to take possession, the mouth of the ditch of El Bracito (*boca acequia del Bracito*), he in evidence thereof, cut off with an axe the bark of two cottonwood trees, where, the wood being left bare, he put: Hacienda of Don Juan Gid, and the year of the date upon both; and then, the commission and the party in interest, Don Juan Gid, being present, they appointed for measurers (chainmen) Don Francisco Lucero and Don José Roybal, who offered to comply faithfully with the duties of their charge. That, in order to commence it, there was given to them and they received an iron chain in good condition which being measured with all care had eleven *varas* of three geometrical feet, as is provided by the Colonization Plan in Article ———. Immediately the first measurement was made about one o'clock in the afternoon over the north course (having known this point with all exactness because the operation was directed by an Anglo-American mathematician, who with the compass (*abujon*) observed the courses) the same terminating at four o'clock the same afternoon at the summit of a hill for the sake of straightness, where a cross monument was placed, and at the foot of it Don Juan Gid buried a stone inscribed with his name and the date, which he recognized as his lawful boundary, and complete measurements of two leagues and a half of five thousand *varas* each. And returning to the east (course) about three o'clock in

the afternoon the measurement was made with the needle to the course (*al viento*), for there was no known water upon that land that may make it desirable for settlement or for "*Hacienda:*" and it was deemed to have the two and a half leagues upon a mount (*cerro*) called La Cueva, in the Organ Mountains; and taking the measurement about half past four o'clock in the afternoon at the cross monument on the west, this proceeded until sunset, crossing in this interval the road that goes to the Rio de las Salinas, and going down a ridge (*ceja*) one league and three "*cordeles*" of one hundred and ten *varas* was completed. And at sunrise the survey was again resumed until completing the two leagues and a half, which was on a hill belonging to the Mount Roblecito (*cerro de Roblecito*) between another black mount (*cerro prieto*) which is to the left, and a red one to the right, where with the same formality as in the other monuments the corner was fixed at that point. And about twelve o'clock of day the commission, the party in interest, and the measurers (*medidores*) returned to the central point of said "*Hacienda,*" from where at about three o'clock in the afternoon the first measurement on the south course was made and it was proceeded with until sunset, when one league and three *cordels* of one hundred and ten *varas* were completed. At sunrise the measurement was continued until completing the two leagues and a half, which was in a glen (*cañada*) that runs up from the river towards the plain below La Mesilla and opposite the Ochoa Bluffs where the cross monument was placed with the same formalities as the others: and the line from this to the south and west being taken with the needle only, the measure is given to where the two and a half leagues may terminate, for the reasons stated in that taken on the east course and

terminated at the Cueba de los Organos, this one ending at half past nine o'clock in the day. And taking the direction to the east about ten o'clock of the same day, it measured nineteen *cordels*, of one hundred and ten *varas*, as far as the road that goes to El Cobre, and as far as the river fifty-one (*cincuenta y una*) where for the reason that it was the hour of midday the said measurement was suspended: and that being passed, it was resumed at about two o'clock in the afternoon until completing the two and a half leagues which terminated upon a hill that lies to the right of the Trujillo marshes, a little beyond these, and opposite the last mount of the El Paso mountains, which is called the Paso of the Alamitos, and in the direction of the Crucitas watering place, where with the customary formalities the corner monument was placed about three o'clock in the afternoon with which the measurements with the said *vara* of three geometrical feet were concluded; at which proceeding the *Alcalde* commissioner in legal form asked the measurers if they acted with the lawfulness they had promised at the time of making the first measurement of the "*Hacienda*," which they had concluded: To which they answered that so they had done, and that they entertain no doubt or responsibility, that they have done it as they had promised. Then the party in interest, Don Juan Gid, was asked by the commission if he was satisfied with the survey concluded in that "*Hacienda*," into the lawful possession of which he was to enter according to the colonization laws; to which he replied, that, having been present at the formality with which the survey of his land had been proceeded with, he was satisfied in all its parts. That being the case, and there being no claim made to suspend the course of these proceedings, the

present commission place Don Juan Gid in lawful possession of said "*Hacienda,*" stating to him that the farm lands which he has in it are the greater part of the bottom lands of the river; that he must not use these for any other purpose except for planting all kinds of edible grains and to supply his trades with the necessaries for agriculture in every matter. That for the raising of live stock of all kinds and horses, what is given to him outside of the said bottom lands of the river is considered sufficient. Charging him also that whatever waters he may take out to run the machines which he proposes to erect, and the others that may occur to them, he must conduct them until they return to their center, so that this town and the adjoining ones of which it is the head may not in any of its parts be made to suffer. Intimating to him lastly that that for which the four individuals present were commissioned, they concluded with this act, in which what has been done until now was signed by the *Alcalde* Don José Morales, Alderman Don José Maria Belarde, Public Attorney Don Lorenzo Provencio, the interested party Dr. Juan Gid, the measurer Don Francisco Lucero, his companion José Roybal not doing so because he does not know how to sign, but he stamped with his own hand a sign of the cross, before me the secretary of the corporation, to which I certify.

José Morales.
José Maria Belarde.
Lorenzo Provencio.
Francisco Lucero.
José Roybal.

Juan Maria Ponce de Leon,
Secretary.

(R., 160.)

Having concluded the commission that the Illustrious *Ayuntamiento* entrusted to us relative to matters stated in the present *expediente*, let this be returned to the said corporation in order that that Honorable Body may do as indicated in the order of the 13th instant; and by this present provision the four commissioners thus determined to-day, the 21st of April, 1823, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José ——renzo Provencio.

Juan Maria Ponce de Leon,
Secretary.

(R., 162 and 163.)

Council Halls of el Paso, April 22nd, 1823. }
Third of our Independence. }

This *Ayuntamiento* having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being five leagues in each direction, *the whole of it composing an "Hacienda," according to Article 5th of the Colonization Plan: which land was granted by this Ayuntamiento to Don Juan Cid for the purpose of settlement* as stated afterwards, and he being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof the president and other members of

which that is composed signing it before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
José Manuel García.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 163.)

Council Halls of El Paso, April 23rd, 1823.

To-day Don Juan Gid has presented a map made by the mathematician Don Guillermo Box, by observing the courses and in conformity with the measurements made of the land of El Bracito. And as it appears to this corporation very useful to attach it to this *expediente*, for the clearness and certainty at all times of what has been done, let it so be done; and by the present order of this Illustrious *Ayuntamiento*, thus it so determined and ordered

and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
José Manuel García.
Saturnino Aguiar.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 167.)

Council Halls, April 25th, 1823.

It appearing to this *Ayuntamiento* to be desirable to aggregate to the *expediente* the minute of the resolution which it adopted on the 3rd of the present month relating to the concession of the land of El Bracito to Don Juan Gid, let it so be done for greater clearness and information in the matter. And by the present order, the president of this Illustrious Corporation so decreed, ordered and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.

Juan Maria Ponce de Leon,
Secretary.

(R., 167.)

Council Halls of El Paso, April 25th, 1823.

The present *expediente* in which there has been granted to *Don Juan Gid, Anglo-American of the*

United States, the lands of El Bracito for settlement, being considered by this *Ayuntamiento* as closed, proceed to what is to be done under the tariff in force in this *Ayuntamiento* and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein, *placing the original in the archive as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe conduct to the Governor of this Province for his superior information;* another of the same kind being given to the party in interest for his protection. And by the present order the president and members of this corporation so determined and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Saturnino Aguiar.
José Manuel García.
Lorenzo Provencio.

Juan Maria Ponce de Leon,
Secretary.

(R., 168)

It is a copy of the original *expediente* which on petition of Don Juan Gid was made *in order to grant to him for settlement* the land of El Bracito, in accordance with the Colonization Plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

Juan Maria Ponce de Leon, Secretary.
[Rubric.]

(R., 168.)

(Here follows plat, to which is attached the following:)

I, Guillermo Box, citizen of the United States of the North of America, master mathematician from the State of Missouri: certify in legal form that the foregoing plat (*mapa*) of the place of El Brito [Bracito] for the settlement of artisans whom Dr. Juan Heath is to bring in, is made by me by order of the gentlemen commissioned by the Illustrious *Ayuntamiento* of this jurisdiction of El Paso, and in due entries thereof I signed it in said town on the 19th of April, 1823.

GUILLERMO BOX.

It is a copy.

JUAN MARIA PONCE DE LEON, Secretary.

[Rubric.]

(R., 168.)

These proceedings were transmitted by the *Ayuntamiento* to the governor and provincial deputation of New Mexico, within whose jurisdiction the land then was, accompanied by the following letter:

LETTER TRANSMITTING PETITION AND PROCEEDINGS TO GOVERNOR.

(Defendants' Exhibit No. 2, R., 170.)

MR. GOVERNOR:—In consequence of the resolution, made by this corporation on the 3rd of April of this year, upon the petition of Don Juan Gid, an Anglo-American, I forward to Your Excellency a copy of the minute and application, together with the subsequent proceedings up to the full execution of Article 4 of the decree of January 3rd of this

year relating to colonization, but as the full *execution of this law is new in these countries*, it has occasioned in two particulars the protest made by Don Agapito Albo, deputy of the province and a lawyer in this town, which I also enclose for the superior information of Your Excellency.

Immediately thereafter, under date of April 17th, there were presented to this corporation two petitions of residents of this town praying that to them also and by reason of preference there be granted to each one at least an *Hacienda* up to the river and of this all of the Bracito. The imitative circumstances of the new settlers and *the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc.*, place this corporation under the necessity of making known to your superiority the resolution, *that Your Excellency may be pleased to dictate whatever may be your pleasure in the matter*, whether it be by yourself or *after consulting the Most Excellent Provincial Deputation.*

"Session of to-day, 24th of April, 1823. This place having granted it by the Most Excellent Provincial Deputation that territory extends up the river as far as San Diego, distant 40 leagues, resolved as a benefit to this public bring before the government the following articles for its approval, if it should find it convenient.

1st. That, in as much as up the river there are only the woods, *these and the pastures shall always be common* both to the families of the colonists that have been admitted in aggregation and to those of this jurisdiction.

2nd. That the farming lands on both sides of the river be not wasted by giving the property therein to stockraisers, and that those who apply for them

be obligated in the terms of the law to cultivate them, to which end it is proper to caution the public that, in asking and granting these lands, order and proportion be observed, for which a superior regulation is especially desired.

3rd. That an effort be made to keep the 30 families of colonists in the center that all those of this jurisdiction may have the advantage of the model of their industries, arts, and instruction which they promise, and in addition to this, and that the intake of water and *acequias* they shall construct above be used by all those below them who desire to imitate their industries and farms, it being understood that this corporation considers as sufficient without admitting others, the master artisans who are to settle at Bracito, to encourage the imitation of the industry and arts if all the old residents of the jurisdiction who desire and can cultivate the farming lands there are on both sides from here to San Diego and by which there will be obtained the happiness of all, and besides this a great restraint of the Apaches in their transit from this settlement to the interior of the province.

4th. That at 4 or 5 leagues distance in circumference of this town property in lands be given to nobody to the extent offered by the decree of colonization, the timber and pasture up the river being always reserved, and in the matter of water there should always be municipal regulations for its distribution and good order, and it will be convenient for these old inhabitants of the jurisdiction to acquire property in the farming between here and San Diego, leaving as we have said, in the middle those who are to be the instructors in our agriculture and industry.

5th. In order to avoid jealousies among private individuals and interests of some breeders of stock

who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of Article 4, inasmuch as to reject it, difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this *Ayuntamiento*, to which it very closely belongs to look out for their happiness, has without delay, put in operation the franchise of the law; *this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination.* Besides this, it had in mind the fact that the new settler came with a recommendation in his passport from the Assembly of the United States, the government of which was the first that recognized our Glorious Independence and has admitted in its court the Ambassadors of the Empire, recognizing them with every formality.

This *Ayuntamiento* has found it convenient and worthy of public confidence *to bring all of the foregoing before Your Excellency and the Most Excellent Provincial Deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter*, which is what is desired.

God preserve Your Excellency many years.

Paso.

José Ygno. Rascon.

Juan Maria Ponce de Leon,
Secretary.

(R., 170–172.)

The provincial deputation disapproved the proceedings, and made to the *Ayuntamiento* the following reply on June 19, 1823 (R., 155, 156):

DISAPPROVAL BY PROVINCIAL DEPUTATION.

(Defendants' Exhibit No. 4.)

OFFICE OF THE SECRETARY OF THE PROVINCIAL DEPUTATION OF NEW MEXICO.

In the session of the 17th of the present month the Acting Govern[illegible] of this province, Captain José Antonio Vizcarra, [illegible]esented to this Deputation the reports which You[illegible]Honorable Body makes to him in an undated of[illegible]al communication which said chief received; and he also presented another official letter dated the 26th of last April, accompanied by a copy of the proceedings had by Your Honorable Body in giving to the foreigner Mr. John Heath at the Bracito, possession of land belonging to the people of that jurisdiction.

The Deputation in the same session resolved to express to Your Honorable Body the surprise it felt at *the violent and mistaken procedure* with which you conducted yourselves *in giving land to foreigners not only with prejudice to the inhabitants of that jurisdiction but also in violation of the same law of which Your Honorable Body availed itself in order to carry into effect the possession referred to,* thus opening the door to the continual complaints of its people: this Deputation refraining from making other observations to Your Honorable Body, *on account of the colonization law which was the moving cause in the concession of the Bracito land to the said Heath having been repealed;* but proceeding *to direct Your*

Honorable Body that in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, *it should notify the said Heath* through the plenipotentiary of the United States resident in New Mexico, or in some other manner which it may deem more prompt and effective, *that the possession which has been given to him at the Bracito*, belonging to that jurisdiction of El Paso, *was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.*

And I communicate it to you by direction of the said Deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition of Mr. Albo and the other persons of that town shall have been discussed, Your Honorable Body notifying me of *the receipt of and compliance with these instructions.*

God preserve Your Honorable Body many years.

Santa Fé, June 19, 1823—The third year of independence and the second of liberty.

FRANCISCO JAVIER CHAVEZ.

JUAN BAUTISTA VIGIL, [Scroll.]
[Scroll.]
Deputy Secretary.

The law under which the grant was attempted to be made was the national colonization law of January 4, 1823, passed by the Instituent Congress under the Emperor Iturbide. The sections which are pertinent to this case are the following, which are taken from Rockwell's Spanish and Mexican Law, pages 617–620, except as noted, where the original Spanish and a correct translation by Mr. Tipton, special agent and Spanish expert of

the Department of Justice, in the office of the United States attorney for the Court of Private Land Claims:

NATIONAL COLONIZATION LAW OF 4TH JANUARY, 1823.

(From Rockwell, except as otherwise noted, pp. 617-620.)

Art. 1. The government of the Mexican nation will protect the liberty, property, and civil rights of all *foreigners*, who profess the Roman Catholic Apostolic religion, the established religion of the empire.

Art. 2. To facilitate their establishment, *the Executive will distribute lands to them*, under the conditions and terms herein expressed. (Original: "*Que se expresarán*"="which may be expressed"—per Mr. Tipton.)

Art. 3. The *Empresarios*, by whom is understood those who introduce at least two hundred families, *shall previously contract with the Executive*, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose; and any other particulars they may deem necessary, in order that with this necessary information, *the Executive may designate the province to which they must direct themselves; the lands which they can occupy with the right of property*, and the other circumstances which may be considered necessary.

ARTICLE 4.

(Defendants' Exhibit No. 5.)

Original Spanish:

Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán inmediatamente al respectivo Ayuntamiento del lugar en que quieran radicarse,

para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear.

(Defendants' Exhibit No. 6.)

Mr. Tipton's Translation:

Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective *Ayuntamiento* of the place at which they desire to establish themselves in order that, *in conformity with the orders which they have from the Executive*, there be *designated to them* by that body the lands to which they are entitled according to the industry which they are going to undertake.

Translation from Rockwell:

Art. 4. Families who emigrate, not included in a contract, shall immediately present themselves to the *Ayuntamiento* of the place where they wish to settle, in order that this body, *in conformity with the instructions of the Executive*, may *designate the lands* corresponding to them, agreeably to the industry which they may establish.

Art. 5. The measurement of land shall be the following: Establishing the *vara* at three geometrical feet, a straight line of five thousand *varas* shall be a league; a square, each of whose sides shall be one league, shall be called a *Sitio;* and this shall be the unity of counting one, two, or more *Sitios; five Sitios shall compose one Hacienda.*

Art. 6. In the distribution made by government, of lands to the colonists for the formation of villages, towns, cities and provinces, a distinction shall be made between grazing lands, destined for

the raising of stock, and lands suitable for farming or planting, on account of the facility of irrigation.

Art. 7. One *Labor* shall be composed of one million square *varas*, that is to say, one thousand *varas* on each side, which measurement shall be the unity for counting one, two, or more *Labors*. These *Labors* can be divided into halves and quarters, but not less.

Art. 8. To the colonists whose occupation is farming, there can not be given less than one *Labor*, and those whose occupation is stock raising, there can not be given less than one *Sitio*.

Art. 9. The *government, of itself, or by means of the authorities authorized for that purpose*, can augment said portions of lands as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

Art. 15. As soon as a sufficient number of families may be united to form one or more towns, their local government shall be regulated, and the constitutional *Ayuntamientos* and other legal establishments formed, in conformity with the laws.

Art. 17. In the distribution of lands for settlement among the different provinces, the government shall take care, that the colonists shall be located in those which it may consider the most important to settle. As a general rule, the colonists who arrive first shall have the preference in the selection of land.

Art. 19. To each *Empresario*, who introduces and establishes families in any of the provinces designated for colonization, *there shall be granted at the rate of three Haciendas and two Labors, for each two hundred families so introduced by him*, but he will lose the right of property over said lands, *should he not have populated and cultivated them, in twelve years*

from the date of the concession. The *premium can not exceed* nine *Haciendas* and six *Labors*, whatever may be the number of families he introduces.

Art. 20. At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing article, must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

Art. 23. If, after two years from the date of the concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; in which case, the respective *Ayuntamiento* can grant it to another.

Art. 24. During the first six years from the date of the concession, the colonists shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

Art. 25. The next six years from the same date, they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time, they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

Art. 26. All the instruments of husbandry, machinery, and other utensils that are introduced by the colonists for their use, at the time of their coming to the empire, shall be free, as also the merchandise introduced by each family, to the amount of two thousand dollars.

Art. 27. All foreigners who come to establish themselves in the empire, shall be *considered as naturalized*, should they exercise any useful profession or industry, by which, at the end of three years, they have a capital to support themselves with

decency, and are married. Those who with the foregoing qualifications marry Mexicans, will acquire particular merit for the obtaining letters of citizenship.

Art. 28. Congress will grant *letters of citizenship* to those who solicit them in conformity with the constitution of the empire.

Iturbide abdicated March 20, 1823, and the acts of his Government were declared illegal and void, and his banishment ordered, by a decree of the constituent congress of Mexico of April 8, 1823, as follows:

DECREE OF APRIL 8TH, 1823.

(Defendants' Exhibit No. 7.)

The Sovereign Constituent Congress of Mexico, in the session of yesterday, decreed the following:

1. That the coronation of Agustin de Iturbide being an *act of violence and of force, and void in law*, there is no occasion to discuss the abdication he makes of the crown.

2. Consequently, it also declares as void the hereditary succession and the titles that have emanated from the coronation; and that *all the acts of the late government, from the 19th of May to the 29th of March last, are illegal*, but subject to revision by the present Congress for their confirmation or revocation.

3. The supreme executive authority will cause the prompt departure of Agustin de Iturbide from the territory of the Nation.

(Reynold's Spanish and Mexican Law, p. 107.)

By another decree, dated April 11, 1823, the colonization law was suspended and provisions made for acting upon grants made under it.

DECREE OF APRIL 11TH, 1823.

(Defendants' Exhibit No. 8.)

In this (order) the government is instructed, if it does not find it inexpedient, to accede to the application of Stephen Austin to confirm his concession to establish 300 families in Texas; *to act upon other applications of like nature, and to suspend until a new resolution the colonization law enacted by the Instituent Council (Junta).*

(Reynold's Spanish and Mexican Law, 108.)

The following chronology will be found useful as the argument proceeds:

Colonization law passed	Jan. 4, 1823
Overthrow of Iturbide	*Mar. 19, 1823*
Banished, and acts under him declared illegal	Apr. 8, 1823
Acts of Ayuntamiento of El Paso *in re.* Heath Grant concluded	Apr. 25, 1823
Disapproval by provincial deputation	June 19, 1823
Banishment of Iturbide	May 11, 1823
Return and execution of Iturbide	July 19, 1824
Heath's colony alleged to have been organized in Missouri, brought to El Paso *via* Soto la Marina, settled on the grant, and driven away from the grant and out of the country, *on account of the overthrow of Iturbide's government* and the undoing of all its acts, *in the years*	*1824* or *1825*
First assertion of claim by Heath or his heirs	*1892*

ARGUMENT

I.

NO FINAL GRANT OF THE LAND DESCRIBED WAS ATTEMPTED BY THE AYUNTAMIENTO.

(*a*) *It was an empresario contract, with conditions annexed which formed the consideration for the grant.*

The proposal and acceptance together formed the contract. Both were professedly and in terms made in virtue of, and in attempted compliance with, the new colonization law, which had been passed January 4, 1823. The execution of this law was, as the *Ayuntamiento* stated in its report to the governor, "new in these countries," and it is not strange that it was not followed with technical accuracy. Nevertheless, an inspection of the record of proceedings leaves no doubt what the intention was, both of Heath and the El Paso authorities.

The application was unquestionably made under article 3 of the law as an *empresario*, and was so understood and acted upon by the *Ayuntamiento*.

The proposals of Heath, to "bring for the settlement of the land * * * thirty families," embracing artisans of various callings, to establish stores of merchandise, erect mills for the manufacture of cotton, cloth, and gunpowder, are set forth as the inducement for the concession, and are in conformity with article 3. The requests

in the petition that "the said *settlement* be annexed to the parish of this jurisdiction;" that "your petitioner be designated as the person for the distribution of the said lands," and that the "pastures and woodlands be common," are consistent with the attitude of a contractor for colonization, and inconsistent with that of a man asking for a grant in fee simple for himself alone. If Heath was to receive the land in severalty as an individual colonist, there was no occasion to ask for power to distribute land to settlers thereon.

Various other allusions throughout the proceedings show that the main thing in contemplation was the introduction of new settlers and families; for example the following:

"*The proposals made by the new settler* for the benefit of the town" were admitted, and he was reminded that the "new *families he shall bring* must be honest and belong to the Roman Catholic religion;" the convocation of the residents of the vicinage on April 13, to ascertain whether they were satisfied with the *new neighbors*, who contemplated joining the jurisdiction (R., 159); the protest of Agapito Albo in relation to the "*families* which Juan Gid proposes to *establish* at the Bracito" on the ground that the farms and machinery offered by the "*new settlers*" might become prejudicial to the old inhabitants; the declaration in response to this of the understanding "by himself and the families with him" (R., 163); the statement in the proceedings of April 25 (R., 168), "that the land of the Bracito was '*granted for settlement to Juan Gid.*'"

This court, in the Maxwell land-grant case (121 U. S., 325, 363), attached great importance to the use of similar expressions in the *expediente* of that grant. The court said:

> It would seem from these orders, decrees, and resolutions of the governor and departmental assembly of the Territory of New Mexico that they must have supposed that the grant was intended for families to be settled upon, and was not one of those in which an individual could only receive a definite quantity of land for his own settlement and cultivation; there would have been little cause for the frequent use of the words "colony" and "colonization," and such expressions as "settling families" in the colony, unless such was the view the granting power took of the nature of the grant.

The fact that the *ayuntamiento* in their communication to the governor refer to the fourth article does not change the character of the transaction; because all their acts indicate, in spite of this, that they were dealing with an *empresario*.

Heath had applied for the grant the previous December, before the colonization law had passed. He was no doubt moved to this by the example of Austin and other Americans, who went to Mexico in 1822, immediately after her independence was established, and solicited concessions for the colonization of families, under *empresario* contracts. (1 Kennedy's Texas, pp. 308–326.)

His first petition, in December, 1822, was addressed to the Emperor, and the proposals therein contained were framed with express reference to the settlement of a colony within Mexican territory. He could have had

no idea of obtaining a grant of land as an individual colonist, unaccompanied by other families, because there was then no warrant, either in law or custom, for such a grant to a foreigner. Without the inducement he held out as consideration for the concession, Heath could not have expected any recognition by the Mexican Government. His second petition was only confirmatory of the first, and shows that the intention was unchanged.

The transaction was of the same nature as that described in *Glen* v. *United States* (13 How., 256, 259), where the court considered the effect of a contract, the moving and only consideration for which was the proposal to introduce colonists and establish manufactures. We cite it as a complete answer to appellant's theory of the absolute character of this grant:

> One Clamorgan petitioned the proper authorities of the province of Louisiana for a large grant on which to establish a manufactory of cordage, and to colonize a large number of persons from Canada who might cultivate hemp. The grant, which was made upon this petition, referred to the above considerations, and contained the following words: "In virtue of this, I concede to him, for him and his heirs, the tract of land which he solicits, in the place and with the same boundaries that he prays for, provided that there is no injury to anyone;" and then refers to a survey which the grantee is expected to make, and the families "which he is bound to cause to come from Canada."

The fact of the grant was thus stated by the court in its opinion, page 256:

> The country was vacant and greatly needed population, which could only be drawn from abroad;

> and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land; that he would introduce cultivators of hemp and artisans skilled in the manufacture of cordage; and would grow hemp and make cordage to an extent so large as to be of national consequence. On the faith of these promises the grant was made.

Upon these papers alone, as in the present case, a title in fee to the land referred to was claimed, and there as here the case of *Arredondo* (6 Peters, 691) was relied upon in support of the contention. But the court readily distinguished between the two cases, as follows:

> But it is insisted that, forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was incumbered with conditions, still, as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by Government for that especial purpose; nor could want of performance be set up as a defense in this suit.
>
> If the premises assumed were true the conclusions would necessarily follow; and Arredondo's Case is relied on in support of this position and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish Government could confer. * * * The subsequent condition there relied on to annul the grant was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held, and the grantee discharged from its performance. But in Clamorgan's Case the conditions to occupy and cultivate were precedent conditions. They addressed themselves to the governor-general, and their performance was required in advance. Before any right existed in

> Clamorgan to apply for a complete title, or even to have a public survey preparatory to such application, he was bound by his contract to establish his colony on the land, and, furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish Government (p. 258). * * * A promise of performance was the sole ground on which the Spanish commandant made the concession, and actual performance was to be the consideration on which a complete title could issue (p. 259).

The concession to Heath was, therefore, a mere executory contract to concede to him what he would be entitled to under the law of January 4, 1823, upon the inducement and consideration that he was to introduce at least thirty families.

(*b*) *The expediente nowhere distinctly purports to grant the land in fee.*

The use of the word "grant" where it occurs and the delivery of possession do not prove it, because both must be taken with the context and in connection with the whole record. The land was to be "assigned to him;" "given to him;" "granted;" "granted for settlement." He was to "be given an *hacienda*" in the same land he has already asked for. He was to be "entrusted with the distribution." He was given "lawful possession" of an "*hacienda.*" And by the declaration of the Ayuntamiento on April 22, after the proceeding was concluded, the land "composed an *hacienda*, according to article 5th of the Colonization Plan; which land was granted by this *Ayuntamiento* to Don Juan Gid *for the purpose of settlement.*"

Under the fifth article the unit of quantity was the *sitio*, which was one square league; five of these composed one *hacienda*.

A *labor* was equal to 177 acres.

A *sitio* was equal to 4,428 acres.

An *hacienda* was equal to 22,140 acres.

The tract designated for Heath was five leagues square, equal to five *haciendas*. Under the law, for the introduction of *two hundred families*, he could only receive *three haciendas* and *two labors*. It is not to be supposed that the *Ayuntamiento*, while professing to act under this very law, would undertake to give him, as a single colonist, nearly double the quantity of land he could obtain as an *empresario* for the settlement of two hundred families.

The *Ayuntamiento* seems to have had the impression, and Heath as well, that the land to be granted for settlement was limited to the quantities mentioned in article 19, both for *empresario* and his settlers. In his petition he asks that "the land which may be assigned to him be at least enough for an *hacienda*," and that the "*designation* be made on both sides of El Bracito, because the land being broken, it is necessary to leave out portions of it," thus indicating clearly that he did not expect to acquire title to the whole tract designated. The *Ayuntamiento* calls the land which was granted to him "for settlement" an *hacienda*, under the 5th article, "being five leagues in each direction." They evidently misunderstood the 5th article, and supposed that the *hacienda* therein defined was five leagues square instead of five square leagues.

Whatever may be found to be the character of the concession attempted to be made, the extent of it was thus expressly limited to *one hacienda*, as defined in the fifth article, within the territory described in the act of possession.

Besides this, it was stipulated in the act of the *Ayuntamiento* accepting his proposals that Juan Gid *and his families* should "only have the *hacienda*, the property of the lands for farming, manufactures, and machines, but *not in the natural pastures and woods, which shall be common*, etc." (R., 169 and 170.) Thus a portion—how much remained undetermined—was expressly excluded from whatever was to be granted.

(c) *It was expressly made subject to the determination of the governor and provincial deputation.*

This is distinctly stated in the act accepting his proposals (R., 168) and in the letter of the *Ayuntamiento* transmitting a copy of the proceedings to the governor, wherein they say, "this corporation stating, nevertheless, that if it has erred in anything *the concession has been made subject to the superior determination.*" (R., 172.)

Such approval was, therefore, a *condition precedent* to the vesting of any right or title whatever, whether executory or executed.

Whatever may have been their powers or duties, the *Ayuntamiento* were not bound to make this grant because Heath petitioned for it. They could refuse it, or attach any qualifications they chose—even an impossible condition—if precedent. It is idle to say that the *Ayuntamiento* had no power to annex such a condition. That

begs the whole question. Unless Heath came with an order from the executive (without which they had under the law no right to act at all) they could have rejected his proposals altogether; *a fortiori* they could accept them conditionally.

The only paper claimants can produce as evidence of a grant is the one which shows this condition expressly annexed. The copy produced is the one from the archives at Santa Fe, which is the identical copy sent to the governor subject to approval.

It is a remarkable and significant fact that nobody seems to have seen any title papers in possession of Heath or his heirs.

Three copies of the *expediente* were made:

1. The original in the archives as a perpetual testimony (the *protocol*).

2. A certified copy to be sent to the governor of the province.

3. Another copy of the same kind for the party in interest, for his protection (the *testimonio*). (Proceedings of April 25, R., 167.)

Either the first or third of these, according to Mexican law and the decisions of the American courts, would be admissible as original evidence. The second, being neither the archive itself nor the copy given out for purpose of evidence in favor of the grantee, but made for an entirely different purpose, is only secondary evidence and not admissible without proof of the loss of one or both the others. We contend that it can not be received as evidence in this case, because no foundation has been laid for its introduction.

But, aside from the technical objection, the fact that this Santa Fe copy is the only evidence claimants can produce tells powerfully against their whole case. If it is admissible at all, it must be taken *as it is*, and for what it purports to be, with all its qualifications and conditions attached. If claimant is entitled to use it at all, he must take it with its burdens and infirmities, and he can not select out the parts that suit him and ignore the rest. This fact is fatal to claimants' case, also, for a still stronger reason, which will be alluded to presently.

II.

THE CONCESSION WAS DISAPPROVED BY THE PROVINCIAL DEPUTATION, AS IN VIOLATION OF LAW.

(*a*) *By this the whole action of the Ayuntamiento became null and void; and the concession became void ab initio.*

They were informed that their procedure was "violent and mistaken;" that it was "in violation of the same law" under which they proposed to act; that the colonization law "which was the moving cause in the concession of the Bracito land to said Heath" had been repealed; and they were instructed to notify Heath "that the possession which has been given to him at the Bracito, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed."

This was communicated to the *Ayuntamiento* by letter of June 19, 1823, which comes from the archives at El Paso of that year. It shows that the repeal of the Iturbide colonization law, which was done on April 8 (before the El Paso concession was concluded), was known at

Santa Fe at least as early as June, 1823, and must necessarily have been known at El Paso at an earlier date, because all communication between the capital and Santa Fe was through El Paso.

(*b*) *This accounts for the nonproduction of the original or the testimonio of the concession.*

In view of their own doubts as to the proper mode of executing the new law, and the care taken by the *Ayuntamiento* to make their action subject to the determination of their superiors, it is not probable that they would deliver to the grantee the *testimonio* at once. It was doubtless withheld, awaiting the decision of the Government; and upon this being received, and found to be adverse, the whole proceeding was probably canceled, and the *testimonio* never delivered to Heath. It appears that the archives for the year 1823 are preserved, and are in El Paso. (See the certificate in this case to the letter from the provincial deputation; also the record in the case of *Lerma* v. *Stevenson*, 40 Fed. Rep., p. 356, cited in claimants' brief.)

(*c*) *The action of the provincial deputation was a complete adjudication, by competent authority, of the fact that the grant was in violation of law, and void.*

No Mexican official, short of the supreme government, would have ventured to sustain or recognize the grant after that decision. No Mexican court would have admitted the proceedings relating to it as evidence of title.

Such adjudication was binding on the Mexican authorities then, and is binding on us seventy years after. This, especially when taken in connection with the repeal of

the acts of the Iturbide government, brings this claim within the class mentioned in section 13 of the act creating the Court of Private Land Claims, which the court is not authorized to confirm. (See law and authorities cited under head VI.)

III.

THE LAW OF JANUARY 4, 1823, CONFERRED NO POWER UPON THE AYUNTAMIENTO TO MAKE A GRANT IN THE FIRST INSTANCE TO AN INDIVIDUAL COLONIST.

The colonization law of 1823 treats exclusively of the granting of lands to foreigners. The essence of the whole scheme is found in the second article, which declares that, "To facilitate their establishment, *the executive will distribute* lands to them, under the conditions and terms herein expressed."

The grants contemplated by this law were of two kinds:

1. To *empresarios* for colonizing families. (Article 3.)

2. To families who should come by themselves, *i. e.*, who were not included in a contract. (Article 4.)

As to the lands to be assigned to *empresarios*, they were to be previously contracted for and designated by the executive itself. When families emigrated not included in a contract, the respective *Ayuntamientos* were to designate lands to them for occupancy, according to the industry which they were going to undertake, in conformity with the instructions of the executive.

There is a slight difference in the phraseology of the different translations of article 4, but it is immaterial which one is adopted. It is perfectly clear from either

one, or from the original Spanish, that no distribution of lands to families not included in a contract could be made by the *Ayuntamiento* except under instructions of the executive, either brought directly by the families applying or received by the *Ayuntamiento* independently. Without such instructions or orders, the *Ayuntamiento* was without authority to act.

In either case, therefore, whether the grant was to be to an *empresario* for colonizing many families or to families who came in their own right, an order from the executive was a prerequisite without which the *Ayuntamiento* was powerless.

The authority of the *Ayuntamiento*, in any event, was limited to "designating" the lands to families who came by themselves in conformity with the orders which might have been received from the executive.

To "designate," according to Webster, means:

> 1. To mark out and make known; to point out; to name; to show; to distinguish by marks or description; to specify—as to *designate* the boundaries of a country.
>
> 2. To indicate or set apart for a purpose or duty; with *to* or *for*.

Because the *Ayuntamiento* assumed to act under the fourth article, and to designate lands to Heath, counsel for claimants say it must be presumed that instructions had been received by that body to do so, on the doctrine that everything done by those in authority is presumed to be done rightly. If so, the same presumption extends to everything else they did in the matter, and this argument is fatal to their whole case. For the presumption

would be equally strong that the *Ayuntamiento* referred the grant to the provincial deputation for its approval and directions, in pursuance of instructions to that effect from the executive, and that this was the only instruction they had, because they say in their communication that the law is new, and they solicit the direction of the deputation.

This is not a case where presumption can be relied upon to supply authority for making the concession, for two reasons:

1. The *Ayuntamientos* were inferior bodies of mere local jurisdiction and limited authority. Whatever authority they had was conferred upon them by statute, and as they were municipal bodies they could take and exercise only such power as was conferred upon them by the will of the sovereign, as expressed in the laws creating them, they could exercise none other. (*Branham* v. *San Jose*, 24 Calif., 585.)

2. For reasons hereafter more fully stated, all presumptions in this case relative to authority or facts not shown by the record to exist, are the other way.

But there is no occasion for indulging in presumption or conjecture as to this matter. It appears clearly by the communication of the *Ayuntamiento* to the governor that that body had proceeded in this case without instructions and without municipal ordinances regulating the distribution of land, and for that reason referred its entire proceedings to the government of the province for approval, and that it might "order what may be just and convenient to remove uncertainties, and to proceed with certainty in every matter."

Counsel for claimants deny that Heath was a contractor; they insist that the grant was made to him individually and exclusively as a "colonist," and they refer to articles 8 and 9 of the law of 1823 as furnishing authority for granting to him an unlimited quantity of land, which read:

> Art. 8. To the colonists whose occupation is farming there can not be given less than one *labor*, and those whose occupation is stock raising there can not be given less than one *sitio*.
>
> Art. 9. The government, of itself, or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

It is in these articles that counsel profess to find an explanation of the action of the *Ayuntamiento* in giving to the "colonist" Heath, who petitioned *neither as a farmer or stock raiser*, a concession of some one hundred and thirty thousand acres of land, or more than twice what he could have received as an *empresario*, if he had brought in the full two hundred families as provided in the law.

This contention is founded upon a complete misconception of the purpose of the eighth and ninth articles. They necessarily refer back to article 6, and must be read in connection with it. They apply only to the distribution of lands *by the Government*, to colonists for the formation of towns, etc., in which a distinction is to be made between lands for farming and for stock raising. The object of fixing a minimum quantity of land to be

given to colonists of these two avocations, was doubtless to protect them against the *empresarios*, who in order to monopolize the best lands in a designated district for their own premium, might wish to restrict the colonists to an insufficient quantity. This would be consistent with the idea of the ninth article, that the Government or its authorized agent, might augment these quantities.

But in any event, the augmentation could only be by the Government itself, or some authority "authorized *for that purpose*," which was not the *Ayuntamiento*. And to "augment" does not mean to grant in the first instance. This is clearly explained by the supreme court of Texas in *Harlan* v. *Haynie* (9 Texas, 459, 463), when construing a similar provision in the colonization law of Coahuila and Texas, of 1825, as follows:

> But what was the character of the bounty intended to be bestowed on colonists? The words of the article are: "It appertains to the Government to augment the quantity indicated," etc., "according to the family, industry and activity of the colonists." Now, what are we to understand by augmentation? Is it an original concession of some certain quantity, or an increase allowed in addition to a quantity already given? Webster defines augment to mean "an enlargement by addition, to enlarge in size, to swell." And so I understand it. Then I do not take the article 17 as authorizing an original grant of land to a colonist. Other articles apply to that description of grants, and not the seventeenth. It, in my judgment, must necessarily be understood as assuming that the colonists claiming the benefits of its provisions had already obtained land. It does not, it will be seen, warrant

concessions to colonists as mere colonists, but to colonists who, in consequence of either their family, industry, or activity, are entitled to greater consideration.

The *Lerma* Case, in 40 Fed. Rep., relied on by plaintiffs, proves nothing. It was expressly made subject to the approval of the departmental assembly, and approved by it in the first instance. Judge Maxey held the grant valid, because the case was before him on agreed statement of facts, by which the validity of the grant was expressly stipulated.

IV.

SUBSEQUENT GRANTS OF SAME LAND BY MEXICO.

The subsequent granting by Mexico of part of the same lands to others, by several distinct grants, was further evidence that Heath's concession was regarded as illegal and void; it amounted to a declaration of that fact by the Government, and was a resumption of the lands. The facts on this subject will be mentioned later on.

V.

THE LAW UNDER WHICH THE GRANT WAS ATTEMPTED WAS DECLARED INVALID BY THE MEXICAN GOVERNMENT APRIL 8, 1823, AFTER THE OVERTHROW OF ITURBIDE.

The Emperor abdicated March 19, 1823, and the constituent congress, which Iturbide had undertaken to dissolve, was reconvened; on April 8 it decreed that the coronation of Iturbide was an act of violence and force, and was null, and all acts of the last government, from

May 19, 1822, to May 29, 1823, were illegal and subject to be revised, confirmed, or revoked by the government then established; and by the decree of April 11, 1823, it was further decreed by the sovereign congress that thereafter the colonization law of the Junta Instituyente should be suspended until a new resolution on the subject. (Reynolds's Spanish and Mexican Law, pp. 107, 108.)

This was a *sovereign declaration* by the Government, from which there was no appeal. Mexico and her citizens were bound by it.

It is a general and acknowledged principle of law that the political power of a government may affirm or disaffirm the acts of a preceding government; and this is undoubtedly true under all changes of sovereignty which may occur, the successor not being bound by the incipient or imperfect acts of a preceding government any further than such government would be by its own acts. (*Paschal* v. *Dangerfield*, 37 Tex., 273; *Jones* v. *Borden*, 3 Tex., 410.)

In the former case the court says (p. 301):

> In the case of an inchoate or incipient title there must be some additional exercise of the granting power before the fee will pass. Such title does not imply ownership either against the sovereign or against the individuals, and such a title emanating from a former government, and which was never recognized by the existing one, forms no foundation for an action.

The constitution of the republic of Texas declared that no future survey or title should be valid unless

sanctioned by the convention or some future law of the congress of the republic.

The supreme court of Texas says of this:

> This is an authoritative declaration of the acknowledged general principle that the primary control over the public domain belongs to the legislative branch of the Government, and that the obligation to respect and complete the incipient titles emanating from a former sovereignty rests exclusively upon the political authority. By this they may be altogether disavowed, or they may be recognized with or without conditions or restrictions. (*Paschal* v. *Perez*, 7 Tex., 348–364.)

According to the principles of the Spanish and Mexican jurisprudence, the construction and interpretation of the laws was vested in the legislature, and we find the principle embodied in the federal constitution of 1824 (article 165), and in that of the State of Coahuila and Texas (articles 97–172). In Spanish jurisprudence the interpretation of laws is divided into the authentic, the customary, and the doctrinal. The authentic is that given by the legislator himself, who alone has the authority to resolve the doubts and fix the sense of words, and whose decision is obligatory on citizens and tribunals, and must be obeyed both within and without the courts of justice. (*Houston* v. *Robertson*, 3 Tex., 26.)

The constituent congress of Mexico, representing the Government of Mexico recognized by the United States (Poinsett's notes, appendix, 87), declared the law under which this grant was made to have been illegally passed, and annulled it. This decision of the proper authority

of the Mexican Government is binding upon our Government.

A Mexican who was injured by it could only appeal to the *favor* of his Government.

A United States citizen only through diplomatic representations, as an international question.

(*a*) *It is therefore not such a claim as the Court of Private Land Claims has authority to confirm.*

By the act organizing that court, no claim can be confirmed unless *valid* under Mexico, or which the United States by treaty is bound to recognize. Section 13 of the act contains the following provision:

> First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect.

This court has several times declared that—

> Under the act of March 3, 1891, it must appear in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant was not complete and perfect, the claimant could

by right, and not by grace, have demanded that it should be made perfect by the former Government, had the territory not been acquired by the United States.

Ainsa v. *United States*, 161 U. S., 223.
United States v. *Santa Fe*, 165 U. S., 715.
United States v. *Sandoval*, 167 U. S., 293.
Bergere et al. v. *United States* (October Term, 1897).

In these cases the construction of the act establishing the Court of Private Land Claims, and the limitations on the power of the court in administering it, are announced and repeated as a settled rule:

> An inchoate claim, which could not have been asserted as an absolute right against the Government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat., 854, and, therefore, is beyond the reach of judicial cognizance. The duty of protecting imperfect rights of property under treaties such as those by which the territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the Government.

Can it be pretended that after the act itself had been declared illegal by the superior authority to which it was referred, and the law under which it was made declared invalid by the sovereign power, such a title could on any principle be considered *valid* under the government thus denouncing it, or one which a subsequent government was bound by treaty to recognize?

(*b*) *The claim is also excluded under the act of March 3, 1891, for nonperformance of conditions.*

The eighth subdivision of section 13 of the act provides that:

> No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition or requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land.

It is admitted that there were conditions annexed to this grant, but counsel for claimants insist that they were conditions subsequent, and that performance of them was excused by reason of various causes alleged. Such causes, if true, might create an equity in favor of the claimants; but for its recognition, under the decisions of this court already cited, recourse must be had to the political department of the government. It will be seen under the next head that the political department of this government has distinctly refused to recognize this class of grants.

THIS WAS THE VERY KIND OF A GRANT WHICH THE UNITED STATES REFUSED TO RECOGNIZE IN THE TREATY OF GUADALUPE HIDALGO.

The tenth article of this treaty, as originally negotiated, provided for the confirmation of colonization contracts which were unperformed. This was stricken out by the United States Senate from the treaty as ratified and the Mexican Government informed that under no circumstances would the American Government assent to it.

This is fully explained and decided in *Inter State Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S., 569.

That case is also decisive of almost every point now before us. There was a grant, in consideration of settlement of two hundred families, for a perfectly described tract of land; allegation of possession given, and settlement of part of the families, and prevention of settlement of the remainder by reason of the Texan revolution—all of which stood admitted by demurrer. Yet this court found no difficulty in deciding that no title had vested.

So Heath's concession was *a grant for settlement* of a colony on condition. Claimants' remarkable evidence and labored argument to prove performance of or discharge from the conditions show that they considered it so.

A fair consideration of the evidence presented to show the settlement of a colony on the land by Heath leaves upon the mind the greatest doubt whether anything of the kind ever occurred.

Presumably Heath was informed of the disapproval and annulment of his concession, as the letter of the provincial deputation directed that he should be. Knowing from the proceedings of the *Ayuntamiento* that their action was made subject to approval, and that a copy of it had been transmitted to the governor for that purpose, it is to be presumed that he awaited the decision upon such reference before risking his entire fortune in an attempt to plant a colony upon land to which he might never obtain title. It is incredible that an expedition, such as is described in the testimony, could have been taken through the interior of Mexico in 1824, settled

near El Paso, and forcibly driven away, without some mention of it being made in the history of the times, and without leaving some memorial or tradition which would have come down to the knowledge of prominent and intelligent old inhabitants of that vicinity. The fact itself is directly contradicted by witnesses of this class, who swear they never heard of it. There is something suspicious about the whole story, and the attempt of the witnesses to corroborate it by reference to the fall of Iturbide does not help the matter at all. It amounts rather to a case of *felo-de-se*.

The repeal of the colonization law in April, 1823, and abrogation of all the acts of Iturbide's government were known in Santa Fe on the 19th of June, 1823. The banishment of Iturbide occurred about the same time. If Heath started from El Paso, either immediately after the action by the *Ayuntamiento* in April or after the receipt of the action of the deputation in July, to go to the United States by sea—the only feasible way then—he must have known of the fall of the Iturbide government before he left Mexico. Yet, according to the witnesses for claimants—who chant the refrain, with singular unison of idea and expression—all of Heath's trouble came on him *after* making a settlement with his colony in 1824, *on account of* the overthrow of Iturbide's government and repeal of its acts, *which had occurred a year before*.

VII.

HEATH WAS NOT WITHOUT REMEDY, IF HE HAD A VALID CLAIM.

1. Under the act of April 11, 1823, by which the Mexican Government authorized the revalidation of such grants on application and proper showing. His case was similar to Austin's. And if it was entitled to the favorable consideration of the Government, he could have obtained by means of this law a confirmation of it by the supreme government, as Austin in fact did. There is no allegation in the petition or proof adduced that Heath ever attempted to avail himself of the privilege thus extended.

2. By the convention of April 11, 1839, for adjustment of claims against Mexico. (8 Statutes at Large, p. 526.)

3. Under Articles XIV and XV of Treaty of Guadelupe Hidalgo. (9 Statutes at Large, p. 933.)

Heath was a citizen of the United States.

(*a*) Citizenship once established is presumed to continue.

(*b*) His own declarations in his petitions assert it.

(*c*) There is no proof to the contrary.

(*d*) Mexican citizenship by naturalization could only be acquired under the law of 1823, articles 27 and 28.

He would therefore be entitled to the benefit of these treaty stipulations. And if the grant had been an absolute one, as claimed, he could have taken possession of it after the cession of the country to the United States, in 1848.

VIII.

IF VALID AT ALL, THE CONCESSION WAS LIMITED TO ONE HACIENDA OF 22,140 ACRES.

As pointed out before, the acts of the *Ayuntamiento* expressly declared that the land to be given to Heath constituted "*an hacienda according to article 5 of the colonization plan.*" This would be five *sitios*, a *sitio* being "a square, each of whose sides shall be one league," or five square leagues in all, amounting to 22,140 acres. The area claimed is stated in the brief of counsel to be about 130,000 acres, although the dimensions stated in the act of possession would make just twenty-five square leagues, or five *haciendas*, equal to 110,720 acres.

Heath's concession, therefore, if anything, is a float for 22,140 acres, to be located within a larger area, within whose boundaries a number of other grants have been subsequently made and definitely located by the Mexican authorities, one of which has been confirmed by the Congress of the United States. A surplus remains undisposed of, sufficient in quantity to satisfy the float.

This would bring the case within the rule laid down by this court in *The United States* v. *McLaughlin* (127 U. S., 128), viz, that the locating of such subsequent definite grants amounted to an exercise of the power of the Government to locate floating grants, and their title is superior to that of the float.

We quote from that case as follows:

> It is in the option of the Government (not of the grantee) to locate the quantity granted; and, of

course, a grant by the Government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the Government has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the Government may dispose of seventy leagues, without doing any wrong to the original grantee. This was the Mexican law, and, of course, it is our law. (*United States* v. *Armijo*, 5 Wall., 444, 449.) In practice, it is true, our authorities, in administering the public lands, have generally allowed the original grantee to make his own selection of the point where he will have his quantity located, provided he has it all located together in one tract. But this is a matter of favor and not a matter of right. If this were not so, the right of way granted for the railroads by Congress would be subject to question and litigation. There can not be any doubt, however, of the validity of these grants. The cases which show the law on this subject are numerous; it is only necessary to refer to a few of them. The following may be consulted: *Fremont* v. *United States*, 17 How., 542, 558, 565; *United States* v. *Armijo*, 5 Wall., 414; *Hornsby* v. *United States*, 10 Wall., 224, 234, 235; *Henshaw* v. *Bissell*, 18 Wall., 255, 266, 267; *Miller* v. *Dale*, 92 U. S., 473, 476, 477; *Van Reynegan* v. *Bolton*, 95 U. S., 33, 36.

The act of Congress of March 3, 1891, constituting the Court of Private Land Claims, provides, by its seventh section that: "The court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed." Therefore, if the court should confirm to the petitioners the hacienda granted by the *Ayuntamiento* of El Paso to Heath, it must be located within the outboundaries, upon lands not subsequently granted or otherwise disposed of by the Mexican Government or that of the United States.

IX.

THE CLAIM IS EXTINGUISHED BY LAPSE OF TIME.

The great length of time for which this claim has remained unasserted not only places it, and all the evidence adduced to support it, under suspicion, but, when considered in connection with the other facts in the record, it will solve every doubt that might by any possibility remain and will constitute a complete defense to the claim.

This defense does not arise under statutes of limitation; and decisions touching the time when such statutes begin to run have nothing to do with the case. It exists outside of and independent of such statutes.

There are certain rules, founded upon the general experience and observation of mankind, by which the conduct of men in their business affairs is tested. Tried by these rules, the deductions drawn from the action or nonaction of men under given circumstances and conditions are so conclusive and irresistible that they will often outweigh even the testimony of witnesses under oath.

Men having large and valuable properties which they believe themselves to own, do not, unless under some disability, leave their property in the quiet enjoyment of others for long periods of time, without objection or some assertion of their rights. "Every person," says Chancellor Kent, "is bound to take care of his own rights, and to vindicate them in due season. This is a sound and salutary principle of law." (1 Johns. Cas., 502.) Lord Erskine, in an opinion often commended by American judges, stated the matter in this wise:

> The presumption from length of time stands upon a clear principle, built upon reason, the nature and character of men, and the result of human experience. A man will naturally enjoy or claim what belongs to him. (*Hillary* v. *Walker*, 12 Vesey, jr., 265.)

The operation of this presumption is by way of a rule of evidence, which, resting upon the weakness and infirmity of all human tribunals when judging of matters of great antiquity, raises up a presumption which takes the place not only of facts, records, or written muniments, but even of the belief in their actual existence.

Therefore, when a series of events, actions, and conditions is so long and long continued that according to the common observation of men they can not be reconciled with the fact or claim asserted, the law will infer the existence of such other facts as might or should have existed in order to make it agree with the results of such observation.

This presumption does not rest at all on the belief that the necessary fact actually existed—though generally

such belief follows irresistibly—but it rests upon the necessity of having, in regard to matters which have become clouded by the lapse of time, some general principle to take the place of individual belief or disbelief.

Therefore it is that from certain combinations of events courts will presume, and presume conclusively, as a rule of evidence often superior to the positive testimony of witnesses, the existence of such facts as are necessary to make the known conduct of the parties agree with the established results of human experience.

Let us apply this principle to the facts of this case:

The last pretended act of Heath was in 1824 or 1825.
This claim was filed..... 1892

Lapse of time..... 67 years.

John G. Heath lived twenty-six years after returning to the United States. There is nothing to indicate that he or his heirs were persons of weak mind, imbecile, or *non compotes mentis*. On the contrary, all the evidence shows that he was a strong, prominent, and wealthy man, of unusual force of character.

"He was a very shrewd, intelligent man, scarcely had an equal, if any, in the State. Was a *leader of men all his life*. Was a lawyer, judge of courts for many years. Member of constitutional convention and of the legislature." (Witness Woodruff; and Mexico certificates, Rec. p. 125.)

He was the last man in the world to quietly give up what belonged to him and let others enjoy it, without protest or objection.

During his lifetime, in 1846, the land passed from Mexico to United States.

If it was his, he could then go and take possession of it under protection of United States.

But though he talked about it with returning soldiers, he made no claim, notwithstanding he lived five or six years afterwards.

New Mexico was occupied by Missourians under General Kearny in 1846, and most of the early commerce and laws were derived from Missouri. So it would have been natural for Heath, a prominent Missourian, to go and assert his claim, if he had any.

Heath left several children:

1. Robert J., born in 1815; married first time, 1844; married second time, 1865; corresponded with lawyers, 1881; moved to El Paso to look up claim, and then abandoned it and dropped out, 1882; died in San Antonio, 1885 or 1886.
2. Joseph Heath, died in 1855.
3. Margaret Heath, died in 1857 or 1858; married James Edsall, who died before her.
4. Harriet Heath, died in 1856; married ——— Dwyer, who died before her.
5. Eliza Heath, died in 1863.

Yet, during all this period of sixty-seven years not a single act can be pointed out in the way of assertion of right or title to this land by any of these parties.

What, on the other hand, was the history of the property and what the conduct of other parties toward it during this period?

1. Consider the *Bracito Grant* to Garcia.

It bore the same name as Heath's, and covered the lower half of the tract as surveyed, its upper boundary being the head of the Bracito Acequia, which was taken as the center of Heath's. (Surv. Gen. Report; Report H. R. 457, first session Thirty-fifth Congress, p. 29; R., 172.)

Up to 1828 occupied by Juan A. Garcia.

After 1828 occupied by Francisco Garcia until expelled by Indians.

1846 Kearny occupied New Mexico.

1848 treaty of Guadelupe Hidalgo.

1849 proceeding by Francisco Garcia, and testimony of witnesses taken.

1851 power of attorney to Stephenson.

1853 suit filed in United States court and testimony.

1854 final decree and survey ordered.

September, 1854, survey made and filed.

July, 1854, act creating surveyor-general for New Mexico.

December 28, 1854, Surveyor-General Pelham arrived at Santa Fe and opened his office. (Report Secretary of Interior, 1856, p. 301.)

January 18, 1855, surveyor-general's proclamation inviting claimants to present their claims. (*Ibid.*, p. 305.)

August 1, 1856, list of documents in archives made by surveyor-general and transmitted to Congress, and published. "No. 834, Grant to John G. Heath." (*Ibid.*, p. 413.)

August 6, 1856. *Bracito claim* of Stephenson *et al.*, filed with surveyor-general. (Rep. H. R. above cited, p. 25, fully describing it by name as "Bracito," on the Rio Grande, Dona Ana County.)

December 31, 1856. Recommended for confirmation by surveyor-general. (*Ibid.*, p. 32.)

February 11, 1857. Reported to Congress by Secretary of Interior. (*Ibid.*, p. 3.)

March 29, 1858. Reported by House Committee on Private Land Claims. (Published in H. R. 457, first session Thirty-fifth Congress, p. 1.)

June 21, 1860. Confirmed by Congress.

1877. Surveyed by United States and platted on public-land surveys.

1880. Marked on maps of New Mexico.

1890. New survey by United States.

2. *Dona Ana Bend grant.* (R., 177.)

1839–1844. Colony established and land distributed to large number of claimants; filed with surveyor-general; approved and recommended for confirmation.

1874. Reported by Secretary of Interior to Congress, published in Ex. Doc. 43, Forty-third Congress, with map, showing the location on Rio Grande, and southwest corner as head of Bracito Acequia.

3. *Mesilla colony grant* (R., 225).

1853. Grant made, and large quantities of land distributed.

1874. Approved and recorded by surveyor-general. Reported to Congress, and published in Ex. Doc. 456.

All the foregoing grants have been surveyed by the United States, and the boundaries thereof marked on the official plats in the surveyor-general's office.

Public-land surveys have been prosecuted within the boundaries claimed from 1858 to 1885.

A large number of entries of land within boundaries claimed have been received in land office.

All land within six and one-half miles of head of Bracito Acequia have been surveyed by the United States either as public land or these grants, thus showing assertion of dominion either by other grantees or the United States *of all* the land embraced within the Heath claim.

Under these various grants and entries of public land large and populous settlements have been made, until there is now within the limits claimed for the Heath grant a population of several thousand people, many of whom, and their predecessors, have had possession, under adverse titles, for more than sixty years.

Against all these acts, thus open, notorious, and advertised in all public ways, there has been not a word of protest or objection from Heath or his heirs from 1824 to 1892.

With these facts in evidence, and after a lapse of sixty-eight years, claimants bring forward their claim for the first time, after all the men of that day are dead, and when nobody is living to tell of the event but those who were children of nine to fifteen years. And they do this without producing the original archive, or the *testimonio*, or accounting for the absence of either; but seek to prove the grant by secondary evidence, with the very copy which bears the evidence of submission to and disapproval by the superior authority.

Upon such an array of facts not only do all presumptions in favor of the validity of acts done or the continued existence of the claim vanish into thin air, but

presumptions against it arise, as matters of law, which are completely decisive of this case.

Out of the multitude of authorities, we have selected a few cases, not so much to show what the law is in this respect, as to show the scope and extent of its application.

"Lapse of time, when it does not operate as a statutory or positive bar, operates by way of evidence, and may create a presumption that parties have waived or abandoned their rights." (12 Amer. and Eng. Encycl. of Law, 542, and numerous cases cited in the notes.)

Akins v. *Hill*, 7 Ga., 573, 577.
Giles v. *Baremore*, 5 Johns., Chy., 545.
Prevost v. *Gratz*, 6 Wheaton, 481, 504.
United States v. *Moore*, 12 How., 209.
Gaines v. *Miller*, 111 U. S., 399, 400.
Fletcher v. *Fuller*, 120 U. S., 544.

In *Akins* v. *Hill* (7 Ga., 573, 577) the court said:

> There is no principle of equity sounder, more conservative, and more prolific in all the fruits of peace than this, that when one slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim, if founded, may from lapse of time be presumed to be lost; until the generation cognizant of the transactions between the parties has passed away, and until original actors are in their graves and their affairs are left to representatives, the law, in the exercise of an equitable sovereignty, presumes it to be unjust that under such circumstances a complainant should be heard; and in nine cases out of ten it is unjust in fact as well as in theory. It is presumed, and the presumption grows out of the principles of human nature developed in universal experience, that men will

use reasonable diligence to get what rightfully belongs to them.

In *Giles* v. *Baremore* (5 Johns. Chy., 545, 551) Chancellor Kent said:

> The presumptions to be drawn by the courts in the case of stale demands are founded in substantial justice and the clearest policy. If the party, having knowledge of his rights, will sit still and without asserting them permit persons to act as if they did not exist, and to acquire interests and consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is, therefore, well settled that the presumption that a demand has been satisfied prevails as much in this court as it does at law. Claims the most solemnly established on the face of them will be presumed to be satisfied after a certain length of time. Matters of record, deeds, and even a private statute, may be presumed to make a good title. The presumption resolves itself into this, that a man will naturally enjoy what belongs to him. These are principles of decision adopted and sanctioned in a variety of cases and by a succession of learned judges in the English court of chancery, and their solidity is not to be questioned.

In *Fletcher* v. *Fuller* (120 U. S., 545) the principle was elaborately stated, as follows:

> In such cases "presumptions," as said by Sir William Grant, "do not always proceed on a belief that the thing presumed has actually taken place." "Grants are frequently presumed," as Lord Mansfield says, *Eldridge* v. *Knott*, Cowp., 215, "merely for the purpose and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles

must forever remain imperfect and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." *Hillary* v. *Waller*. 12 Ves., 239, 252.

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements and a conviction that they can be readily obtained at any time.

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and

4. That he obtained indemnification from the *Ayuntamiento* of El Paso.

5. That he put in his claim against Mexico under the convention of 1839 and obtained compensation.

6. That his claim was adjudicated and extinguished under Articles XIV and XV of treaty of Guadelupe Hidalgo.

7. That he acquiesced in the decision of the provincial deputation disapproving the grant because he became satisfied that the grant was void.

8. That for other reasons he abandoned the grant and all claim under it.

9. That he never went to El Paso with his colony at all.

Respectfully submitted.

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